United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2008

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GOVERNMENT OF UNITED STATES ex rel. ROBERT SHABAN,

Petitioner-Appellee,

-against-

STANLEY ESSEN Director of the Brooklyn Rehabilitation Center, NEW YORK STATE DRUG ABUSE CONTROL COMMISSION,

Respondent-Appellants.

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BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Statement

This is an appeal by the State from an order of the United States District Court for the Eastern District of New York (Platt, J.) dated December 24, 1974 sustaining a petition for writ of habeas corpus and directing the New York State Drug Abuse Control Commission to release appellee "to after care status to which he was released by DACC in December 1972."

Questions Presented

Must a habeas corpus petition be dismissed where there is a failure to exhaust state remedies?

Did the single district court have power to enjoin enforcement of state law upon a ground of unconstitutionality?

Prior Proceedings

In a petition for writ of habeas corpus Shaban, a certified narcotic addict, sought his release from the Brooklyn Central Rehabilitation Center. On December 20, 1974 the District Judge ordered a hearing on the petition to be held on December 24, 1974 (27-30)*, and the hearing was held pursuant to the court's order. At that time the Commission presented the testimony of John L. Sullivan, appellee's drug aftercare officer at the Rehabilitation Center, and of Dr. Krauz. The testimony established the following facts:

On July 14, 1972 appellee was certified to the Commission for a three year period (43). On December 11, 1972 he was released from Arthur Kill Facility on aftercare (39-40). At that time he signed a form containing the rules and

*Numerals in parenthesis refer to the page numbers of Appellant's Appendix.

regulations of aftercare (37). The form indicated that he agreed to report to his aftercare officer as directed (39).

Sullivan, appellee's drug aftercare officer supervised him from August of 1973 until September 6, 1974 when he was declared lost to contact for not reporting a substantial period of time, and a warrant was issued for his arrest (33-35). The basis for declaring him delinquent was his failure to report and his deteriorating pattern of function (42). When the officer first assumed the case, appellee reported to him once a month, and he was working, going to school and making an excellent adjustment. That adjustment began to deteriorate. Shaban dropped out of college, caused himself to be fired from his job by excessive absenteeism and his plan for the summer was to collect unemployment and to go to the beach. On June 11, 1974 the officer placed appellee on weekly reporting. After July 30, 1974 Shaban stopped reporting and stopped coming (34-36).

The aftercare officer visited Shaban's house, talked to his father and made five or six phone calls to

his parents to try to determine appellee's whereabouts (35; 39). The parents indicated that they had no idea where he was (35).

On November 30, 1974 Shaban's attorney surrendered appellee to the Police Department (41; 48). On December 6, 1974 he was returned to the narcotics facility pursuant to the detainer warrant (34). After discussion with Shaban the decision was made to hold him for an indefinite period in a residential status because of his reporting record and adjustment. (36)

The three year certification was originally due to expire on July 13, 1975 but with the addition of delinquent time from September 6, 1974 (when he was declared lost to contact) to the time of his return to the Commission (43) on December 6, 1974 (34) the expiration date was extended [by ninety-one days to October 12, 1975].

On December 18, 1974 Shaban who is twenty-two years old admitted to Dr. Krauz that he used heroin for seven years and that he used amphetamines LSD, hallucinogens and belladona (44-46). In the doctor's opinion Shaban was a drug dependent person. (45)

In a petition for writ of habeas corpus initiated in the Supreme Court, Kings County, Shaban asserted that subsequent to the certification and his release on an

outpatient basis he plead to an indictment; that for the purpose of determining what sentence should be imposed the court ordered an examination concerning whether he was drug dependent; and that the doctor found insufficient evidence upon which to declare that he was a narcotic addict. He contended that the certification of addiction made in 1972 should be vacated and that he should go entirely free.

On December 4, 1974 Special Term dismissed the petition for writ of habeas corpus. On December 12, 1974 the Appellate Division, Second Department denied motion for a preference in the hearing of the appeal. [On December 18, 1974 Special Term denied a motion to set aside the judgment dismissing the habeas corpus petition].

In the federal habeas petition appellee alleged that the earliest the state appeal could be perfected would be during February 1975 at which time he would have served almost two months of a proposed three month incarceration. (7) The District Court ruled that he had no adequate available state remedy. (60)

The District Court, citing Ball v. Jones, 43 A D 2d 281 (4th Dept. 1974)* and Morrissey v. Brewer, 408 U.S.

*Ball supra has been appealed to the New York Court of Appeals. The appeal has been argued, but decision has not yet been rendered.

471 (1972), declared that section 81.30 of the Mental Hygiene Law which grants the Commission power to order a drug dependent person from aftercare supervision to inpatient treatment does not meet minimum due process requirements in that it does not provide for written notice of the alleged violation and a preliminary and/or final hearing prior to revocation of aftercare status. (61)

ARGUMENT

THE DISTRICT JUDGE ERRED IN REFUSING TO DISMISS THE PETITION FOR FAILURE TO EXHAUST STATE REMEDIES, AND HE LACKED POWER TO ENJOIN ENFORCEMENT OF STATE LAW UPON A GROUND OF UNCONSTITUTIONALITY.

In the state habeas petition appellee claimed that he was not an addict and that he should go entirely free. The petition was denied and he appealed. Instead of proceeding with the appeal he initiated the federal proceeding. The District Court erred in sustaining the petition. He was required to dismiss it for failure to exhaust state remedies. Preiser v. Rodriguez, 411 U.S. 475 (1973).

Shaban sought to show that the appeal was not an adequate and available state remedy. He failed to

demonstrate the contention. In this connection he alleged in the petition that the Commission proposed to hold him as an inpatient for three months; that the Appellate Division, Second Department denied his motion for a preference; and that the earliest the appeal could be perfected would be during February, 1975 at which time he would have completed almost two months of a proposed three month incarceration. The allegations did not support the argument or were not established at the hearing.

Appellee failed to establish that he was remanded to the custody of the Commission for a period of ninety days, and the District Court's finding that the Commission proposed to hold him as an inpatient for ninety days is clearly erroneous. The finding was based on the allegations in appellee's moving papers. Shaban did not take the stand and the claim was contradicted by the aftercare officer who testified that the decision was made to hold appellee for an indefinite period in residential status. See page 4, supra.

Appellee claimed that he was not an addict and he did not seek release on aftercare but outright release.* See Argro v. United States, 505 F 2d 1374, 1375 n. 1 (2d Cir. 1974). He was in the same position as any state prisoner attacking the validity of a commitment where an alleged delay in processing an appeal is not the equivalent of an absence of effective state appellate process. See Ralls v. Manson, 503 F 2d 491, 493-494 (2d Cir. 1974). In this connection, it should be noted that the certification will not expire until October 12, 1975 (originally July 13, 1974). See p. 4, supra. Thus, the state remedy was still available even after the denial of the motion for a preference in the hearing of the appeal.

The District Judge declared that section 81.30 of the Mental Hygiene Law which grants the Commission power to order a drug dependent person from aftercare supervision to in-patient treatment does not meet minimum due process requirements, and he ordered the Commission to restore appellee

*Appellee sought outright release in the state court and he continued to seek outright release in the district court until the end of the federal hearing when he acquiesced in the court's suggestion that he agree to being restored to aftercare.

to aftercare status. The declaration and order amounted to an injunction restraining the Commission's order changing appellee's status from aftercare supervision to in-patient treatment upon the ground of unconstitutionality of state statute without an application having been made to and heard and determined by a three judge court as required by 28 USC § 2281. The District Judge was without the power. As it was stated in Lecci v. Cahn, 493 F. 2d 826, 830 n. 6 (2d Cir. 1974)

> "... We are at a loss to understand how a single district judge who has been asked to declare a state statute unconstitutional and also to enjoin its enforcement, is empowered to act. A three-judge court is mandated by 28 USC § 2281. See Nieves v. Oswald, 477 F 2d 1109 (2nd Cir. 1973).

Additionally the District Court's order directing the Commission to return appellee to aftercare status amounted to treating the habeas petition as if it were a suit in equity under the Civil Rights Act. As such an action it was barred by res judicata. This Court should take judicial notice that appellee invoked Ball supra and Morrissey supra on a motion to set aside the judgment dismissing the state petition for writ of habeas corpus, and the application was denied. The constitutional argument was in fact made

to the state court and the contention was rejected. See Tang v. Appellate Division of N.Y. Supreme Ct., First Dept., 487 F 2d 138, 143 (2d Dept. 1974); Thistlethwaite v. City of New York, 497 F 2d 339 (2d Cir. 1974); Lackawanna Police Benevolent Ass'n. v. Bolen, 446 F 2d 52 (2d Cir. 1971) Lombard v. Board of Education, 502 F 2d 631, 636-637 (2d Cir. 1974).

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED.

Dated: New York, New York
February 28, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
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SAMUEL A. HIRSHOWITZ
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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANNA M. VELEZ, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellant herein. on the 3rd day of March, , 1975, she served the annexed upon the following named person :

JOEL H. BRETTSCHNEIDER, ESQ.
Attorney For Appellee
26 Court Street
Brooklyn, New York 11242

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Anna M. Velez

Sworn to before me this
3rd day of March, , 1975

Burton Kerman
Assistant Attorney General
of the State of New York